

(7)
No. 91-122

Supreme Court, U.S.
FILED
DEC 27 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

PFZ PROPERTIES, INC.,

Petitioner,

v.

RENE ALBERTO RODRIGUEZ, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit

**BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS
CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a public interest law center committed to strengthening three constitutional pillars of a free society: economic liberty, private property rights, and the free marketplace of ideas.

This case involves the viability of the "substantive due process" doctrine as a restraint on oppressive and arbitrary government actions that significantly impair the exercise of an individual's private property rights. The Institute for Justice represents individuals across the

nation whose liberty and property rights have been violated by abusive government actions. The outcome in this case is of direct and immediate concern to the Institute's clients and to its mission of strengthening the constitutional protections of economic liberty and private property rights. We believe our expertise in this area of law can provide the Court with context and historical perspective that may be helpful in resolving the important legal issues at stake.

STATEMENT OF THE CASE

The district court and court of appeals held that petitioner failed to state a substantive due process claim under the Fourteenth Amendment and 42 U.S.C. § 1983 for the delay and denial of building permits by the respondent government officials. Review is limited to the question "Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983."

Since this petition involves a dismissal for failure to state a cause of action, petitioner's allegations are taken as true. Petitioner alleges that respondent officials have intentionally engaged in a 15-year pattern of delay, deception, and politically motivated manipulation of the building permit process, with the ultimate consequence of denying petitioner the opportunity to develop his property.

In 1976, the Planning Board of Puerto Rico adopted a resolution approving a development project proposed by

petitioner. The proposal was forwarded to the Regulations and Permits Authority (ARPE), which performs ministerial functions and issues building permits. In February 1981, ARPE approved petitioner's development plans by formal resolution. Petitioner filed construction drawings as required in February 1982. Thereafter, the project encountered years of unexplained delay. In February 1987, the administrator of ARPE prepared a letter establishing further conditions for the proposed development, but his successor as administrator secretly locked the letter in a drawer where it remained until disclosed in discovery in this lawsuit. The reason for the delay and deception was political opposition to the proposed development.

In August 1988, after petitioner filed his initial action in this matter, ARPE finally informed petitioner it would not issue a construction permit and rescinded the prior resolutions approving the project. The reasons given for these actions were wilfully false. Review of these actions by Puerto Rico courts is discretionary, and the courts declined to exercise such discretionary review in this case. Petitioner filed the present amended complaint in October 1988. The district court granted respondent's motion to dismiss, and the court of appeals affirmed that decision.

SUMMARY OF ARGUMENT

The Fourteenth Amendment was enacted to protect individuals in their lives, liberty, and property against oppressive and arbitrary actions of state governments.

During the Reconstruction era in which the amendment was adopted, state officials enforced laws that were facially reasonable in a manner that nonetheless had the intent and effect of depriving individuals of their rights. So today do state and local officials sometimes manipulate the machinery of government in a manner offensive to the Fourteenth Amendment's core purpose.

Substantive due process protects liberty and property by ensuring that actions of state officials that have the intent and effect of diminishing liberty or property must rationally serve a legitimate government purpose even if those actions are taken in conformity with appropriate procedures. This doctrine leaves wide latitude for the state's police powers, even if exercised in mistaken or misguided fashion. Substantive due process thus protects against only the most outrageous abuses of government power; but the doctrine is nonetheless vitally important, since it provides one of the few substantive restraints on oppressive actions of state officials.

The ruling below would extinguish this protection in the context of property rights. Petitioner has alleged a pattern of pernicious and abusive actions by government officials that have prevented him from developing his property. The ruling by the court below that these allegations do not even state a cause of action under the Fourteenth Amendment and 42 U.S.C. § 1983 is a serious departure from the jurisprudence of this Court and other circuits, as well as from the Fourteenth Amendment's clear objectives. If upheld, the decision below would have the effect of singling out property rights for non-protection under substantive due process, thereby depriving

individuals of an important constitutional safeguard of their property rights.

ARGUMENT

I. A CORE PURPOSE OF THE FOURTEENTH AMENDMENT IS TO PROTECT PROPERTY RIGHTS AGAINST ARBITRARY AND OPPRESSIVE ACTIONS OF STATE OFFICIALS

The southern states did not take lightly their defeat in the Civil War. They determined that if they could not perpetuate the institution of slavery as such, they would maintain it as closely as practicable by denying to the recently freed slaves the most basic rights of free individuals.

The southern governments unleashed a torrent of laws aimed at restricting freedom of contract, private property rights, and the right to pursue trades and businesses. These measures included occupational licensing laws, vagrancy laws, and "debt peonage" laws, many of which were facially neutral but evil in intent and devastating in effect. Together, they comprised a pervasive, interlocking system of economic restraints designed to maintain a servile labor supply and inhibit true emancipation of blacks. See, e.g., G. Myrdal, *An American Dilemma* 228-229 (1944); *Civil Rights and the American Negro* 223-224 (A. Blaustein and R. Zangrando, eds., 1968); R. Higgs, *Competition and Coercion* 7 and 134 (1977); Roback, "Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?" 51 *Univ. of Chicago L. Rev.* 1161, 1163-1164 (1984).

Congress responded to these abuses by passing the Civil Rights Act of 1866, which was designed, in the words of its floor manager, Rep. James F. Wilson, to secure "the absolute rights of individuals, such as 'the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.'" Blaustein and Zangrando at 224-225. The act was quite specific in guaranteeing to all citizens the right to

make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws [for] the security of persons and property. . . .

President Andrew Johnson vetoed the act on the grounds that Congress lacked authority to enact it. Though Congress overrode the veto, it moved at once to safeguard the act's provisions by "constitutionalizing" them in the Fourteenth Amendment. See Siegan, "Economic Liberties and the Constitution: Protection at the State Level," in *Economic Liberties and the Judiciary* 137-150 (J. Dorn and H. Manne, eds., 1987). The amendment's framers "viewed the trilogy of privileges and immunities, due process, and equal protection of the laws as a caption for the rights enumerated in the Civil Rights Act [of 1866]." H. Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* 122 (1978). The amendment's framers repeatedly defined the substantive content of these provisions by reference to Justice Bushrod Washington's decision in *Corfield v. Coryell*, 6. F. Cas. 546, 551-552 (C.C.E.D. Pa. 1823), which included among the "fundamental" rights of citizens "the enjoyment of life and liberty, with the right to acquire and possess

property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." See *Slaughter-House Cases*, 83 U.S. 36, 75-76; *id.* at 97-98 (Field, J., dissenting); *id.* at 114-118 (Bradley, J., dissenting).¹ Congress subsequently enacted the Civil Rights Act of 1871, creating a private cause of action, codified as 42 U.S.C. § 1983, for deprivations of these rights inflicted "under color of state law."

This Court traditionally has protected property rights and economic liberty under the due process and equal protection clauses. The facts presented in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), are paradigmatic of the abuses the Fourteenth Amendment was intended to remedy. In that case, the San Francisco city government enacted an ordinance requiring licenses, granted at the discretion of the board of supervisors, for laundry businesses except those in buildings made of brick or stone. Though the law appeared benign, it was enforced to deny licenses to Chinese entrepreneurs even though they "complied with every reasonable condition demanded by any public interest." *Id.* at 366. Concluding that the power exercised by the board of supervisors was "purely arbitrary, and acknowledges neither guidance nor restraint," the Court struck down the city's license denials as a violation of

¹ These rights were included among the "privileges or immunities" of citizenship, but this clause of the Fourteenth Amendment was eviscerated in the *Slaughter-House Cases*. This decision is the subject of extensive criticism. See, e.g., C. Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century* 60-68 (1990); M. Curtis, *No State Shall Abridge* (1986); B. Siegan, *Economic Liberties and the Constitution* 47-54 (1980).

due process and equal protection. The nature, theory, and institutions of our government, the Court declared, "do not mean to leave room for the play and action of purely personal and arbitrary power." *Id.* at 369-370.

The Court's declaration in *Yick Wo* of what has come to be the essence of substantive due process – that oppressive government actions infringing on basic rights are contrary to our constitutional system – continues to have resonance today. Indeed, the proliferation at every level of government of unelected bureaucrats² and regulatory agencies makes the exercise of government power ever more susceptible to abuse and ever less accountable through ordinary democratic processes.

The Fifth Circuit noted with alarm this propensity in *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029 (5th Cir. 1980), *rev'd in part and remanded*, 455 U.S. 283 (1982), *opinion extended*, 713 F.2d 137 (5th Cir. 1983). In *Aladdin's Castle*, the city government induced a company to make a major investment in a local business, only to then deny it a business license. The court invalidated the city's actions as a violation of due process and equal protection, declaring that

We certainly have no wish to challenge the legitimacy of many, even most of the statutes, ordinances and regulations issued by the innumerable legislatures and agencies in our modern and complex society. The era of *Lochner v. New York*, 198 U.S. 45 [1905], is happily long

ended. Nevertheless, recognition of the multiple problems and needs of our contemporary world does not oblige us to discard the basic principles of constitutional government to which we have always been committed. . . .

It is not the courts alone who are bound to respect these freedoms. Executives and legislatures, from the nation's capital to the smallest village . . . are called upon by our Constitution to respect, enforce and cherish these principles of liberty and personal autonomy.

Id. at 1044-1046. Despite its modest sweep in curtailing only those oppressive actions that fall clearly outside a state's legitimate police powers, the doctrine of substantive due process is a vitally important safeguard protecting the lives, liberty, and property of individuals.

II. A PATTERN OF DECEPTION, DELAY, AND POLITICALLY MOTIVATED MANIPULATION OF THE BUILDING PERMIT PROCESS STATES A CLAIM UNDER THE FOURTEENTH AMENDMENT AND 42 U.S.C. § 1983

A. *The dichotomy between property rights and other rights is a false one.* The First Circuit in its decision below acknowledges that "'substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'" *'PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991)(citations omitted). However, the court appears to carve out a special exception to this

² Respondent Rodriguez, administrator of respondent ARPE, is a political appointee who serves at the pleasure of the governor. P.R. Laws Ann., tit. 23, § 71c.

protection for the exercise of certain property rights, holding as a matter of law that "refusals to issue building permits do not ordinarily implicate substantive due process." *Id.* at 31. This is true, in the First Circuit's view, "[e]ven where state officials have allegedly violated state law or administrative decisions," *id.*, and even if such violations are committed in bad faith. *Id.* at 32. This doctrine of nonprotection of property development rights allowed the court to conclude here that "[e]ven assuming [respondent] engaged in delaying tactics and refused to issue permits for the . . . project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution" under substantive due process. *Id.*

Although the court did not explain its rationale, the only distinguishing factor between this case and other cases in which similar abusive and oppressive actions of government officials would trigger substantive due process analysis is the species of rights involved – in this case, the right to develop one's property. Similarly, the Seventh Circuit has created a special category for non-protection of property rights under substantive due process. *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990). Stating that "the Supreme Court has yet to set the contours of any substantive due process right with respect to property interests," *id.* at 1480 n.5, the Seventh Circuit held that in order to state such a claim for the denial of a building permit, "in addition to alleging that the decision was arbitrary or irrational, 'the plaintiff must also show either a separate

constitutional violation or the inadequacy of state law remedies.' " *Id.* at 1481 (citation omitted).

The notion that property rights somehow do not rise to the level of other rights with respect to substantive due process protection has no support either in the decisions of this Court or in the clear intent of the Fourteenth Amendment. To the contrary, the preceding section illustrates that property rights were of foremost concern to the amendment's framers, who sought to protect those rights against precisely the type of arbitrary and oppressive interference at issue in this case.

Moreover, this Court has made clear that property rights are not limited to mere ownership of property, but the "right to possess, use, and dispose of it." *United States v. General Motors*, 323 U.S. 377-378 (1945). Indeed, as Justice Harlan observed, the concept of due process encompasses "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . ." *Poe v. Ullman*, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting)(cited with approval in *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)(plurality)).

The Ninth Circuit has rejected the dichotomy suggested by the court below. In *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), cert. denied sub nom. *Doody v. Sinaloa Lake Owners Ass'n*, 110 S.Ct. 1317 (1990), the Ninth Circuit applied the same substantive due process analysis it uses in police brutality cases to allegations that local government officials maliciously and unnecessarily violated private property

rights. In an opinion by Judge Alex Kozinski, the court held that

the fourteenth amendment's due process clause protects property no less than life and liberty. . . . To the extent that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other governmental powers from similar constitutional restraints.

Id. at 1408-1409. We urge the Court to adopt the Ninth Circuit's uniform approach to substantive due process analysis as the rule most consistent with the theory of rights embraced by the Fourteenth Amendment, and with the overwhelming weight of precedent as discussed below.

B. *The facts as alleged state a substantive due process cause of action.* This Court has established the contours of substantive due process scrutiny in a series of cases. In *Daniels v. Williams*, 474 U.S. 327, 331 (1986), this Court observed that "by barring certain government actions regardless of the fairness of the procedures used to implement them," substantive due process "serves to protect governmental power from being 'used for purposes of oppression' . . ." (citation omitted). The Court noted that "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original), in such contexts as real estate assessment, driver's license suspension, student corporal punishment, and intentional destruction of a prison inmate's property. *Id.* By the same token, substantive due

process does not restrain negligent acts of state officials which cause unintended loss or injury, see *Daniels, id.*; or to lack of due care by prison officials. *Davidson v. Cannon*, 474 U.S. 344 (1986). Rather, substantive due process operates to prevent public officials from "abusing governmental power, or employing it as an instrument of oppression. . . ." *Id.* at 348.

In such situations, the Court consistently has weighed "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982). This analysis consists of a two-part test, which demands that a law "shall not be unreasonably arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

Apart from the First and Seventh Circuits, the courts of appeals have applied these standards in property rights cases analogous to the present litigation, consistently holding that facts like those alleged here state a substantive due process cause of action under 42 U.S.C. § 1983. In *Brady v. Town of Colchester*, 863 F.2d 205 (2nd Cir. 1988), for instance, the Second Circuit overturned summary judgment that was granted against a claim that a building permit was impermissibly revoked. Cautioning that "'federal courts should not become zoning boards of appeal'" and that a § 1983 cause of action is not established "every time a local zoning board makes an incorrect decision," the court nonetheless held that the plaintiffs had alleged facts that could allow them to "prove that they were denied a permit not because of a

good faith mistake . . . but because of indefensible reasons such as impermissible political animus." *Id.* at 215-216 (citation omitted). *Accord, Littlefield v. City of Afton*, 785 F.2d 596, 605-607 (8th Cir. 1986)(reviewing like holdings of the Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits).

Likewise, in *Bello v. Walker*, 840 F.2d 1124, 1129-1130 (3rd Cir.), cert. denied, 488 U.S. 851 (1988), the Third Circuit overturned a summary judgment award in favor of a municipality that allegedly delayed consideration of a building permit, since the plaintiffs

presented evidence from which a fact finder could reasonably conclude that certain council members . . . improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), the Ninth Circuit held that a denial of a building permit under circumstances similar to the present case amounted to a constitutional violation. As the court summarized the facts,

The City Council voted to withhold Bateson's building permit without providing Bateson with any process, let alone "due" process. This sort of arbitrary administration of the local regulations, which singles out one individual to be treated

discriminatorily, amounts to a violation of that individual's substantive due process rights.

Id. at 1303.

These precedents do not give courts open-ended authority, but limit substantive due process scrutiny to the most outrageous abuses of government power. As Judge Kozinski summarized the applicable parameters in *Sinaloa Lake*, 882 F.2d at 1409:

To be sure, governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power.

As the First Circuit itself observed in *Amsden v. Moran*, 904 F.2d 748, 754 n.5 (1st Cir. 1990), cert. denied, 111 S.Ct. 713 (1991), "In the substantive due process context, the requisite arbitrariness and caprice must be stunning, evidencing more than humdrum legal error." To characterize as "humdrum legal error" the facts alleged in the complaint here – a 15-year pattern of delay, deception, and politically motivated manipulation of the building permit process – is to trivialize, and indeed to negate altogether, the precious private property rights that are at the core of the Fourteenth Amendment's guarantee. We therefore urge the Court to agree with the precedents of the majority of circuits that facts such as these state a substantive due process claim under 42 U.S.C. § 1983.

C. The substantive due process claim alleged here is complementary to, but not duplicative of, a takings claim under the Fifth Amendment. Many of the lawsuits challenging arbitrary denials of property development rights allege both "takings" claims under the Fifth Amendment as well as substantive due process claims under the Fourteenth Amendment. While these claims often overlap, we believe it essential to preserve a separate substantive due process cause of action for arbitrary and oppressive actions that impair property rights.

The first and most important distinction between the two causes of action in this context is that the takings clause generally "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987)(citations omitted). Unlike substantive due process, which seeks to prevent government officials from "abusing governmental power, or employing it as an instrument of oppression," *Davidson*, 474 U.S. at 348, the takings clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 314-315 (emphasis in original). Hence, while compensation may be available even for temporary takings that "deny a landowner all use of his property," *id.* at 318, a "substantive due process claim does not require proof that all use of the property has been denied [citation omitted], but rather that the interference with property rights was irrational or arbitrary." *Bateson v. Geisse*, 857 F.2d at 1303.

Moreover, although this Court has suggested that a taking of private property may be proscribed if it is not rationally related to a legitimate public purpose, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984), substantive due process is more amenable to equitable relief, such as writs of mandamus, that are often necessary to vindicate the property rights at issue. This is especially significant in light of a number of decisions holding that takings claims are not ripe until state compensation proceedings are exhausted, whereas federal substantive due process claims are ripe the moment the constitutional injury occurs. See, e.g., *Sinaloa Lake*, 882 F.2d at 1402-1404 and 1407; accord, *Bateson v. Geisse*, *supra*; *Littlefield v. City of Afton*, *supra*. In the instant case, plaintiffs have alleged constant delays in processing their permit applications and that state procedures are unavailing to protect their constitutional rights; hence, immediate equitable relief is the only meaningful remedy to vindicate their rights.

Finally, takings claims offer limited recourse where the governmental actions do not involve a physical taking of real property, but rather the opportunity to pursue a profession or occupation. In these situations, substantive due process and equal protection are among the few available limitations of oppressive governmental actions that impair economic liberties protected under the Fourteenth Amendment. See *Yick Wo*, *supra*. As a consequence, we urge the Court to preserve carefully defined substantive due process protections for property rights.



CONCLUSION

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court reverse the opinion below.

Respectfully submitted,

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